Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 95-61
	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	

COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

In large part due to the pro-competitive policies of the 1992 Cable Act and the Commission's implementing rules, wireless cable has emerged as a competitive alternative to wired cable systems. Since the passage of the 1992 Cable Act, the wireless cable industry has experienced substantial subscriber growth. Even more importantly, over the past year the industry has raised over one billion dollars in debt and equity financing, assuring that the launching of new systems and addition of new subscribers will accelerate in the coming years. Although only a few wireless cable systems to date have achieved sufficient subscriber penetration as to free their wired competitors from rate regulation, the availability of capital, the anticipated end of MDS and ITFS application freezes, and the introduction of digital compression technology should soon result in more wireless systems serving as "effective competition."

The benefits of competition from wireless cable can be enhanced by fine-tuning the 1992 Cable Act and the Commission's implementing rules to eliminate unintended impediments to competition. Section 628 of the Communications Act should be amended to assure fair dealing by all programmers, whether or not vertically integrated. Congress should clarify that cable systems are required to maintain uniform pricing among like subscribers within a franchise area, even after effective competition exists. If necessary, the Commission should recommend that Congress afford the Commission explicit authority over internal cabling devoted to a single multiple dwelling unit, even if such cabling is in common areas. Also, the Commission should reiterate its previous

suggestion that Congress amend the Communications Act to permit the non-franchised use of wiring to serve subdivisions, townhomes. trailer parks and other areas that can be wired without crossing public rights of way. Finally. Congress or the Commission should ban cable operators from seeking or securing deed covenants and other restrictions on the installation of antennas.

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Implementation of Sections 12 and 19 of the Cable	)	
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Act of 1992	)	
	)	
Annual Assessment of the Status of Competition	)	
in the Market for the Delivery of Video Programming	)	

COMMENTS

The Wireless Cable Association International, Inc. ("WCAI"), by its attorneys, hereby submits its initial comments in response to the *Notice of Inquiry* ("*NOI*") commencing this proceeding.[1]

With the *NOI*, the Commission has for the second time embarked upon the process of gathering information necessary to comply with the mandate of Section 19(g) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") that the Commission annually report to Congress "on the status of competition in the market for the delivery of video programming."[2] WCAI welcomes this opportunity to assist the Commission in complying with Section 19(g), for there can be no denying that the wireless cable industry has been a primary beneficiary of the pro-competitive

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[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 95-186, CS Docket No. 95-61 (rel. May 24, 1995)[hereinafter cited as "*NOI*"].

[2] 47 U.S.C. § 548(g).

provisions of the 1992 Cable Act. Yet, as WCAI will discuss in detail below, there is more that can be done to fine-tune the 1992 Cable Act and the Commission's implementing rules so as to promote the emergence of wireless cable and other competitive alternatives to cable.

I. WIRELESS CABLE CONTINUES TO EMERGE AS A COMPETITIVE ALTERNATIVE TO WIRED CABLE.

In no small measure thanks to the pro-competitive policies of the 1992 Cable Act and the Commission's implementing rules, there can no longer be any doubt that wireless cable is providing consumers in many markets with a competitive alternative to their wired cable service provider, and soon will be expanding across the country.

A. The Wireless Cable Industry Has Experienced Substantial Growth Since Passage of the 1992 Cable Act.

The wireless cable industry has experienced substantial growth of late. When Congress was debating the 1992 Cable Act, the wireless cable industry was operating just 45 systems, serving approximately 350,000 subscribers.[3] In the Section 19(g) report submitted to Congress last year, the Commission found that wireless cable had grown to "143 systems serving 550,000 subscribers by June 1994."[4] Today, WCAI estimates that there are approximately 190 systems in operation, serving about 800,000 homes. During

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[3] S.R. No. 102-92, 102d Cong., 1st Sess.. at 14.

[4] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Annual Assessment of the Status of Competition the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7482 (1994) [hereinafter cited as "*1994 Competition Report*"].

calendar 1994, the eight publicly traded wireless cable companies with operating markets increased their number of subscribers by 150%.[5] Perhaps more importantly, experts such as Paul Kagan Associates, Inc. ("Kagan") are predicting that wireless cable will experience continued dramatic growth throughout the decade:

Year	Estimated Year-end Subscriber Total
1995	1,372,000
1996	1,856,000
1997	2,274,000
1998	2,635,000
1999	2,987,000
2000	3,289,000

Source: Paul Kagan Associates, Inc., Wireless Cable Investor, at 2 (April 25, 1994).

Indeed, the Multimedia Research Group of Sunnyvale, CA, expects subscribership to top 4,000,000 and wireless cable to generate $2 billion in annual revenue by the year 2000.[6]

B. The Recent Availability Of Capital, Coupled With Lifting Of The Freezes On New MDS and ITFS Application Backlogs, Should Fuel A Rapid Expansion Of The Wireless Cable Subscriber Base.

The rapid growth of the wireless cable industry has been fueled by recent debt financings that almost certainly would not have been made but for investor confidence in

[5]*See*, "Wireless Cable Growth Stats, 1994: A Good Year," *Wireless Cable Investor*, at 5 (April 30, 1995).

[6]Pendleton, "Staking Out the Competition." *Cable World* at 78, 84 (May 8, 1995).

wireless cable engendered by the 1992 Cable Act and the FCC's implementing rules.[7] As Kagan noted earlier this year:

> Capital-minded wireless cable operators haven't raised a dime in the public equity markets for more than 15 months, but they have not been idle.
>
> In the past five months, five of the nine publicly traded wireless companies and two privately held companies have sourced $668 mil. of debt in preferred stock funding from both private and public creditors.
>
> Beyond that, $70 mil. has been readied by CAI Wireless, with an initial $150 mil. public bond offering being readied.[8]

Indeed, *Broadcasting & Cable* reported last month that, "These are heady days for wireless cable operators. While it was once hard for the wireless cable industry to get access to capital, the tide appears to be turning."[9]

The industry's improved access to capital has coincided with a year of consolidation within the industry. Experience has shown that wireless cable system owners must achieve substantial size in terms of number of homes passed in order to tap the debt and equity markets that are essential to growth. Many system owners that lacked a critical mass of homes passed found themselves unable to secure the funding necessary to add new subscribers. Not surprisingly, then, during the past year there have been a series of mergers and acquisitions within the industry that have resulted in larger entities

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[7]Brown, "MMDS (wireless cable): A Capital Ideal," *Broadcasting & Cable*, at 15 (May 1, 1995) [hereinafter cited as "A Capital Ideal"].

[8]*Wireless Cable Investor*, at 1 (May 31, 1995).

[9]A Capital Ideal, at 16.

better able to finance system growth.[10] The result is an industry better positioned to compete effectively with entrenched wired cable systems.[11] Certainly, the fact that several local exchange carriers have recently made significant financial commitments to the industry[12] has further bolstered the ability of wireless cable to attract financing.[13]

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[10]*See, e.g.* Gibbons, "Wireless Operator Preferred Agrees To Sell To PCTV," *Multichannel News*, at 40 (April 3, 1995)(reporting on acquisition by People's Choice TV Corp. ("PCTV") of wireless cable systems in Chicago and Detroit); Neel, "A Wireless Operator on the Move, *Cable World*, at 20 (Feb. 20, 1995)(reporting on acquisition by American Telecasting, Inc. of four markets); *Wireless Cable Investor*, at 1 (March 31, 1995)(reporting on planned merger of ACS Enterprises, Inc. and CAI Wireless Systems, Inc. ("CAI") and acquisition by CAI of undeveloped markets in Washington, Baltimore and Pittsburgh); "ATI Gets Control of Three California System, *Wireless Cable Investor*, at 7 (May 31, 1995)(reporting on ATI acquisition of systems in Fresno, Visalia and Merced, CA); "WBSA Buys Yakima, WA, System," *Wireless Cable Investor*, at 7 (May 31, 1995); "PCTV Lines Up Channels, Funds," *Wireless Cable Investor*, at 6 (May 31, 1995)(reporting on acquisition by PCTV of Indianapolis and Casa Grande markets); "Wireless Broadcasting Acquires Boise System," *Private Cable & Wireless Cable*, at 28 (June 1995).

[11]Not only will these larger entities be able to access the capital necessary to add new subscribers, but they will enjoy economies of scale that should reduce the cost of service to subscribers. Among other things, these larger entities will benefit from volume discounts offered by reception equipment and programming vendors. *See 1994 Competition Report*, 9 FCC Rcd at 7483 n. 223.

[12]*See* Naik, "PacTel to Buy Tiny Wireless Cable Firm for $120 Million to Speed Video Project," *Wall St. J.*, at A4 (April 18, 1995); Gibbons, "Wireless Op Receives $100M from Baby Bells, *Multichannel News*, at 58 (April 3, 1995). The *NOI* inquires as to whether these investments are "part of a trend towards increased local telephone company ("LEC") investment in wireless cable facilities" and whether "such interests [are] likely to lead to increased competition with cable systems." While WCAI will leave it to the LECs to respond to the first part of that inquiry, there can be no doubt that involvement by LECs is beneficial to competition. With their financial strength and technical resources, LECs are well-positioned to provide consumers with a wireless cable service that can effectively compete against wired competitors and the Direct Broadcast Service ("DBS"). While the recent investments by Bell Atlantic, NYNEX and Pacific

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A survey conducted by WCAI revealed that, with the exception of a small number of rural systems, most wireless cable operators intend to compete against wired cable systems. Yet, it is rare at the present time for a wireless cable system to be "effective competition" to a competing wired cable system such that the wired system is freed from rate regulation. To WCAI's best knowledge, only a handful of wireless cable systems have achieved sufficient penetration into the marketplace that they meet the fifteen percent

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[12](...continued)
Telesis have drawn the first significant attention to LEC involvement in wireless cable, the fact is that in several markets throughout the country, telephone companies unaffiliated with the Regional Bell Operating Companies have been successfully operating wireless cable systems for some time. There is no evidence from those markets of any anti-competitive impact resulting from telephone company involvement.

[13]*See* Higgins, "Telco Deals Juicing Wireless Operators' Finances," *Multichannel News*, at 158 (May 8, 1995).

benchmark of Section 76.905(b)(2)(ii) of the Rules.[14] This can be traced to several factors.

First and foremost, until recently the wireless cable industry lacked the financial wherewithal to reach the fifteen percent benchmark. Although wireless cable technology is significantly less expensive to deploy than traditional coaxial cable,[15] it is not inexpensive. The initial cost of starting a system, before adding the first subscriber, can range from just under $1 million for a small, relatively unsophisticated rural system, to several million dollars for a state-of-the-art major market facility. Although the marginal

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[14] The *NOI* inquires as to whether "MMDS systems achieved success by emphasizing price competition (offering comparable services, or the most desired services, at substantially lower rates), or has it proven to be a more successful strategy to emphasize product differentiation (offering services that are not available from principal competitors, or offering higher quality services)?" *NOI*, at ¶ 32(a). While the answer varies on a system-by-system basis, it is fair to say that most successful wireless cable system operators combine both strategies. Certainly, those wireless cable systems that compete head-to-head against an entrenched wired system have found it necessary to offer subscribers the most popular programming services at lower prices than the wired system. However, many wireless cable systems also emphasize superior customer service in order to differentiate themselves from their competitors. For example, ATI offers hourly service appointments and free installation if the technician fails to arrive within 15 minutes of the one hour window. See Neel, "A Wireless Operator on the Move, Cable World, at 20 (Feb. 20, 1995). While it is unusual for a wireless system to have access to programming not carried by its competitors, some wireless cable systems are able to differentiate themselves based on programming. For example, during a retransmission consent dispute between the Corpus Christi, TX Fox affiliate and the local wired system, the Corpus Christi wireless cable system was the sole source of Fox network programming in the area. Similarly, the wireless cable system in Jackson, MS has differentiated itself by retransmitting local programming originated over a Jackson Low Power Television station that is not retransmitted by the local cable operator.

[15] *See 1994 Competition Report*, 9 FCC Rcd at 7484; Lee, "Wireless Cable-Television Sector Is on Acquisition Binge," *Wall St. J.* (June 8, 1994).

cost of adding a subscriber will vary from system to system depending upon the sophistication of the technology employed, marketing expenses and other variables, it generally runs in the neighborhood of $400-600. Thus, it takes substantial capital to develop any significant subscriber base, much less one that qualifies a wireless system as "effective competition" under Section 76.905(b)(2)(ii). With the recent influx of capital into the industry, WCAI anticipates that by this time next year, far more wired cable systems will find themselves subject to effective competition from wireless cable.

Second, several nascent wireless cable systems have focused their initial marketing and installation efforts on uncabled areas in order to maximize the efficiency of those efforts. It should come as no surprise that wireless cable systems generate higher penetration rates in uncabled areas than in those areas where they compete against wired cable. New systems can maximize the number of subscribers per marketing dollar by targeting uncabled areas, while at the same time reducing installation costs in those areas through economies of scale associated with making multiple installations in close proximity to each other. As a result, many operators tend immediately after system launch to focus towards serving the uncabled market, diverting resources to cabled areas only as the demand in uncabled areas becomes sated. Thus, over time the percentage of wireless cable subscribers residing in areas served by wired cable should increase.

Finally, many wireless cable systems operating today lack sufficient channel capacity in their markets to provide a viable alternative to wired cable. The thirty-three Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service

("ITFS") channels in the 2150-2162 MHz and 2500-2690 MHz band are adequate (albeit just barely) for the provision of a service that is competitive with wired cable. The Commission has acknowledged "that wireless cable operators endeavoring to compete with wired cable systems, whose number of channels often exceeds 50, must have access to as many of the available 32 or 33 ITFS and MMDS channels as possible in a given market."[16] When more than a handful of those channels are unavailable to the wireless cable system, the public does not perceive the wireless service as a viable alternative. With only 32 or 33 channels available, access to even three or four more channels can be the difference between effective competition and no competition at all.

Although in some major markets channel unavailability is the result of extensive use of ITFS channels for educational purposes, by and large the wireless cable channel shortage is attributable to the various application processing backlogs and resulting freezes that have plagued the MDS and the ITFS for the past several years. Operators suffering from a lack of critical channel mass generally target their marketing towards non-cabled areas until additional channel capacity can be secured.

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[16] *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994); *see also Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 971, 972 (1990) ("A fundamental and critical element in the viability of any multiple channel subscription television service is the need to maximize the number of channels offered to subscribers by the system.").

Based on its recent actions in MM Docket No. 93-24 and MM Docket No. 94-131 and PP Docket No. 93-523, it appears that the Commission will soon be accepting applications for new ITFS and MDS facilities.[17] While WCAI is concerned that the recently-adopted, but as yet unreleased, rules surrounding MDS auctions may frustrate the ability of existing system operators to add additional channels to their systems, WCAI will have to await the release of the full text of the Commission's decision before developing a position regarding those rules. For the time being, WCAI is cautiously optimistic that these actions will result in most essential MDS and ITFS channels being made available for wireless cable use within the next twelve months. If the new rules fairly permit wireless cable operators to garner additional channel capacity, the ability of wireless cable to compete directly with wired cable will be enhanced.[18]

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[17]*See Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, Report and Order*, MM Docket No. 93-24, FCC 95-51 (rel. Feb 1, 1995); "Improved MDS Filing Procedures Adopted; Simultaneous Multiple Round Bidding Auction Method Adopted," *News Release*, MM Docket 94-131 and PP Docket 93-253 (rel. June 15, 1995).

[18]The Commission has recently recommended to Congress that the Commission be authorized to delegate to the staff authority to act on routine comparisons of mutually-exclusive ITFS applications. *See* Attachment to Commissioners' Letter to House Commerce Committee Chairman Thomas Bliley, Jr., dated May 26, 1995, at 25. WCAI is fully supportive of that recommendation, and suggests that it be reiterated in the Commission's 1995 Section 19(g) report.

C. Digital Compression Technology Should Make Wireless Cable A More Effective Competitor To Wired Cable, Although It Is Uncertain When Such Technology Will Be Widely Available.

In addition, the ability of many wireless cable operators to effectively compete with entrenched wired systems likely will be enhanced in the not-too-distant future by the introduction of digital compression to the industry. The Commission correctly has recognized on several occasions that wireless cable's ability to effectively compete is hampered by its current inability to transmit as many channels as its cable and DBS competition.[19] Yet, the Commission has also correctly acknowledged that "the use of digital compression is expected to alleviate wireless cable's channel capacity problem in the near future."[20] Chairman Hundt clearly had it right when he recently announced that:

> we are committed to introducing competition to the cable pipe . . . by letting [wireless cable] services become commercially viable. *To do this, we have to let MMDS license holders go digital.*[21]

Moreover, while the ability to expand the number of video programming services offered to consumers is the most significant benefit to be realized by the use of digital

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[19]*See 1994 Competition Report*, 9 FCC Rcd at 7485; *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Notice of Proposed Rulemaking*, 9 FCC Rcd 7665, 7666-67 [hereinafter cited as "*MDS Auction NPRM*"]; *Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994).

[20]*1994 Competition Report*, 9 FCC Rcd at 7488; *see MDS Auction NPRM*, 9 FCC Rcd at 7667.

[21]Remarks by Chairman Reed Hundt before the Wertheim-Schroder Variety Conference, at 8 (April 4, 1995)(emphasis added) [hereinafter cited as "*Hundt Remarks*"].

modulation by MDS and ITFS licensees, it is hardly the only benefit. Digitization will also result in improved picture quality for viewers, increase the number of sites that will have wireless cable service available,[22] and provide the ability to simultaneously transmit a wide variety of video, voice and data services over the MDS and ITFS bandwidth.[23] As such, digitization is essential if wireless cable is to play a meaningful role in the National Information Infrastructure.

The wireless cable industry has been aggressively moving towards digitization since mid-1992, when a consortium of wireless cable operators and major equipment suppliers laid the ground work for The Wireless Cable Research and Development Center (the "Wireless Cable R&D Center"). The Wireless Cable R&D Center became a reality in early 1993, formed to introduce digital compression into the wireless cable environment as soon as practicable.[24] More recently, the Wireless Cable Digital Alliance was

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[22]The number of sites that MDS and ITFS stations will be able to serve through digitization will increase due to several factors. First, in many markets (including several major markets), extensive ITFS use has made it impossible to free sufficient channel capacity for a viable wireless cable system. Use of digital compression technology in those markets will afford consumers access to a commercially attractive number of channels, while still providing ample capacity for local educational needs. Second, because of the benefits of digital technology, high quality signals will become available in some areas where due to terrain, foliage, multipath or other factors, the analog wireless cable signal is of insufficient quality to market to subscribers or provide to ITFS receive sites.

[23]*See Hundt Remarks*, at 6-7.

[24]*See, e.g.* "Wireless Industry Creates R&D Lab," *Cable World*, at 3 (April 26, 1993); "Wireless Cos. Look to Compression," *Multichannel News*, at 2 (April 26, 1993); "In Brief," *Broadcasting*, at 80 (April 26, 1993).

established to further wireless cable technology development.[25] At the Wireless Cable Technical Symposium held last February by WCAI, these groups, as well as individual manufacturers, presented favorable reports on the progress to date in the development of wireless cable digital technology.[26] As the trade press put it, "Operators of wireless MMDS systems are ecstatic over a recent round of digital video compression tests . . . which showed that their biggest bottleneck -- channel capacity -- can be technically overcome."[27] Not surprisingly, several manufacturers are well along in developing equipment specifically intended to address the digital transmission and reception needs of wireless cable. Indeed, Cross Country Wireless Cable, Inc. and National Wireless Holdings Inc. have announced plans to develop digitally compressed systems in the Los Angeles and Miami areas, respectively, where heavy educational use of the ITFS channels has heretofore thwarted wireless cable system development.[28]

The Commission must recognize, however, that it is still too early to predict with any degree of certainty when digital compression technology will be introduced into the wireless cable marketplace on any broad scale. Digital compression equipment is not

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[25]*See* Ellis and Gibbons, "Atel, Zenith Spark Wireless Alliance," *Multichannel News*, at 8 (June 27, 1994).

[26]*See* "Trying to See the Digital Future," *Wireless Cable Investor*, at 2-3 (Feb. 28, 1995).

[27]Ellis, "Digital Tests Hearten Wireless Cable Execs," *Multichannel News*, at 6 (Mar. 13, 1995).

[28]Katz, "Cross Country: We Have L.A. Wireless Market," *Multichannel News*, at 6 (June 27, 1994); *Wireless Cable Investor*, at 1 (Feb. 28, 1995).

currently available for use in wireless cable. and even the most optimistic estimates suggest that equipment will not be available for several months at the very earliest.[29] Moreover, before digital modulation schemes can be introduced by MDS and ITFS licensees, the Commission must clarify that the regulatory framework developed for an analog environment can accommodate digital. In his recent speech before the National Cable Television Association's annual convention. Chairman Hundt promised that "[l]ater this year the Commission will authorize MMDS to go digital."[30] Achievement of that goal will advance the wireless industry's ability to compete against cable and DBS systems with far more channels.

The *NOI* inquires as to "How are MMDS system operators planning to deploy digital compression technology?"[31] The answer to that question varies on a system-by-system basis. While some wireless cable systems may launch fully digitally compressed systems or rapidly convert to compression of all channels once equipment becomes available, other wireless systems will take a different approach. Because initial costs of

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[29]Moreover, compounding matters, the Commission has announced that it intends to explore adoption of technical standards to govern digital video services generally; it is unclear whether this announcement will slow equipment development until the Commission acts. *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment*, FCC 94-80, ET Docket No. 93-7, at ¶ 144 (rel. May 4, 1994).

[30]Speech by Chairman Reed Hundt before the National Cable Television Association, at 4 (May 9, 1995).

[31]*NOI*, at ¶32(b).

set-top decompression units are likely to be high, many wireless cable operators contemplate the development of so-called "hybrid" systems that combine analog and digital signals. In some cases, operators hope to digitally compress a few ITFS channels, transmit all ITFS programming over those compressed channels, and outfit ITFS receive sites with decompression equipment, while utilizing the remaining channels in a non-compressed analog mode to transmit commercial programming to wireless cable subscribers. The net effect will be to free additional channels for commercial use without having to outfit the wireless cable subscriber base with expensive decompression equipment.[32] Then, as the price of decompression equipment falls (as it inevitably will),

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[32]The *NOI* inquires as to the costs associated with the deployment of digital compression technology and whether wireless cable system operators will be able to employ that technology at low enough cost to remain competitive with incumbent cable operators. *See NOI*, at ¶32(c). WCAI believes that, although expensive, the cost of converting to digital technology will not be so great as to preclude wireless cable from employing digital technology to enhance its competitive potential *vis a vis* cable. As the Commission recognized in its *1994 Competition Report*, wireless cable can upgrade to digital compression and interactive technology at a lower cost per subscriber than wired cable system operators. *See* 9 FCC Rcd at 7484. Although the cost of converting to digital compression technology will be substantial in all cases, it will vary from system to system. At each receive site, the cost of decompression equipment is expected to add several hundred dollars to the cost of the settop unit, with the premium declining over time to perhaps as little as $100. At the transmit site, the cost of conversion will vary with the number of channels to be converted, the condition of the equipment that is currently installed and the amount of local encoding equipment that will be needed. While some wireless cable system operators will be able to utilize their existing transmitters in a digital mode, others (primarily those with older equipment) will find it necessary to replace their transmitters. In addition, the cost of implementing digital compression technology will vary from system to system depending upon the amount of programming that will be compressed at the local level. Digital encoding equipment is likely to be quite expensive, and the more encoding that must be done by the system, the more expensive the conversion process will be. It is for this reason that wireless cable

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wireless cable operators will convert to full digital operation as and when local marketplace conditions demand. Before "hybrid" systems can be developed, however, the Commission will have to amend its rules regarding ITFS minimum usage requirements to accommodate the shifting of all ITFS programming to digitally compressed channels.

II. FINE-TUNING OF THE 1992 CABLE ACT AND THE COMMISSION'S IMPLEMENTING RULES WILL ELIMINATE UNINTENDED IMPEDIMENTS TO COMPETITION.

A. Amending Section 628 of the Communications Act To Assure Fair Dealing By All Programmers, Whether Or Not Vertically Integrated And Whether Or Not They Utilize Satellite Distribution, Will Promote Competition.

With just a few exceptions, the provisions of the 1992 Cable Act designed to assure wireless cable operators fair access to programming have proven effective. The relative paucity of complaints filed with the Commission on program access issues strongly suggests that most programmers are making good faith efforts to comply with the letter and with the spirit of the law.

Yet, events since passage of the 1992 Cable Act demonstrate that loopholes exist which can be taken advantage of to deprive emerging multichannel video programming distributors ("MVPDs") of fair access to programming. In retrospect, the greatest flaw in the 1992 Cable Act's efforts to promote fair access to programming was Congress' decision to limit the scope of Section 19 to only those programmers in which a cable operator has an attributable interest.

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[32](...continued)
operators must be assured fair access to compressed sources of programming. *See, e.g.* Reply Comments of WCAI, MM Docket No. 94-48, at 3-4 (filed July 29, 1994); *1994 Competition Report*, 9 FCC Rcd at 7555-56.

Simply put, the power that wired cable exerts over programmers stems not only from vertical integration, but also from its status as the current local distribution monopoly. Wireless cable, DBS and other emerging technologies will some day provide effective local distribution outlets for programmers. Today, however, their combined subscriber base is so small that no programmer can hope to survive without substantial wired cable carriage. As a result, all programmers, whether or not vertically integrated, are subject to the market power of wired cable.[33] Annexed as Attachment A is an article recently published by Prof. David Waterman in the *Federal Communications Law Journal* in which Prof. Waterman fully analyzes the marketplace for video programming and concludes that "[a]ny program access requirements should apply equally to integrated and nonintegrated program suppliers."[34]

In its *1994 Competition Report*, the Commission correctly noted that it has taken steps to assure that cable system operators cannot coerce exclusive programming agreements from non-integrated programmers.[35] However, the Commission has done

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[33]Indeed, when Sumner M. Redstone, Chairman of Viacom International, Inc. ("Viacom"), testified before the Senate Subcommittee on Antitrust, Monopolies, and Business Rights concerning the anti-competitive abuses Viacom has suffered at the hands of Tele-Communications, Inc. ("TCI"), he forthrightly admitted that Viacom had been subjected to abuse, yet failed to come forward before because it feared retaliation. *Communications Daily*, Vol. 13, No. 208 at 2 (released October 28, 1993).

[34]Waterman, "Vertical Integration and Program Access in the Cable Television Industry, 47 *Fed. Comm. L.J.* 511, 528 (1995).

[35]*See 1994 Competition Report*, 9 FCC Rcd at 7531 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of*

(continued...)

nothing -- because it lacks authority under the 1992 Cable Act -- to address the more prevalent problem. Several non-integrated programmers charge wireless cable system operators substantially higher rates for their programming than are charged similarly situated franchised cable system operators. Such conduct by a vertically-integrated programmer would be unlawful. Given the structure of the marketplace as discussed by Prof. Waterman, his conclusion that program access should apply equally to all program suppliers is obviously correct. Thus, the Commission should make an appropriate recommendation that Congress amend Section 628 of the Communications Act.[36]

Similarly, the Commission should recommend that Congress extend the program access provisions of the 1992 Cable Act so that they are applicable to not only satellite-distributed programming services, but all programming services regardless of the means of distribution. With coming increase in the use of fiber optics, microwave and other technologies for the distribution of video programming, limiting the program access provisions of the 1992 Cable Act and the Commission's implementing rules solely to those programmers that employ satellites for signal distribution no longer makes sense. In its *1994 Competition Report*, the Commission acknowledged the potential for abuse regarding programming not delivered by satellite, and promised that "the Commission will

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[35](...continued)
Competition and Diversity in Video Programming Distribution and Carriage, 9 FCC Rcd 4415 (1994)).

[36]The only exception should be those programming services that are produced by the cable operator solely for its own use, and not for resale to others.

monitor industry conduct regarding programming services that are not delivered via satellite transmission."[37] WCAI is aware of at least one case where access to programming distributed via microwave was denied to the local wireless cable system operator.[38] Given the comprehensive re-examination of the 1992 Cable Act currently underway by Congress, the time is now ripe to close this loophole.

B. The Commission Should Recommend That Congress Amend The Cable Act To Assure Consumers The Benefits of Uniform Pricing.

One question posed in the *NOI* asks, "What impediments are there to the development of wireless cable, and how have they changed since the *1994 Competition Report*?"[39] The recent decision by the United States Court of Appeals for the District of Columbia Circuit in *Time Warner Entertainment Co., L.P. v. FCC* threatens to revive discriminatory "rifle shot" marketing practices by certain cable systems that had impeded competition before they were banned by the Commission.

The Commission, in its *Third Order on Reconsideration* in MM Docket Nos. 92-266 and 92-262,[40] interpreted the uniform pricing requirement of Section 543(d) of the

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[37] *1994 Competition Report*, 9 FCC Rcd at 7532.

[38] In that case, the programmer also was not vertically integrated, illustrating both flaws in Section 19 of the 1992 Cable Act.

[39] *NOI*, at ¶32(f).

[40] *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration*, 9 FCC Rcd. 4316 (1994) [hereinafter cited as "*Third Order on Reconsideration*"].

Communications Act[41] to require each cable operator to set a geographically uniform price structure within each franchise area regardless of whether the system is subject to "effective competition."[42] In extending the uniform pricing requirement to cable operators regardless of whether they face "effective competition," the Commission noted that the charging of different rates with no economic justification and unfairly undercutting competitors' prices could occur even in areas with sufficient competition or with low penetration sufficient to meet the 1992 Cable Act's definition of "effective competition."[43] Such irregular rates, the Commission correctly noted, "would not only permit the charging of noncompetitive rates to consumers that are unprotected by either rate regulation or competitive pressure on rates, but also stifle the expansion of existing, especially nascent, competition."[44] The Commission has been proven correct, for Section 543(d) and the

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[41]47 U.S.C. § 543(d).

[42]*See Third Order on Reconsideration*, 9 FCC Rcd. at 4325-27; 47 C.F.R. § 76.984.

[43]*See Third Order on Reconsideration*, 9 FCC Rcd. at 4327.

[44]*Id.* The Commission's reasoning in extending the uniform pricing requirement to all cable systems is significant, for it illustrates the importance of this issue to consumers:

> For example, if a wireless cable operator served 60% of the homes passed by a cable system in a franchise area and achieved a 30% penetration rate, effective competition would be found. Under our current rule [*i.e. the rule that has just been reinstated by the Court*], the cable operator would be free to charge one price where the wireless cable system reaches and a higher price where it does not. That could result in the subsidization of the cable operator's competitive responses to the wireless cable operator by the 40% of consumers who do not have a choice of competing operators. Accordingly, we will apply the uniform rate structure requirement to all

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